

BEFORE THE
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
WASHINGTON, D.C.

In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)

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Copyright Royalty Board

SOUNDEXCHANGE'S RESPONSE TO IHEARTMEDIA, INC.'S FILING REGARDING
SOUNDEXCHANGE'S EVIDENTIARY OBJECTIONS

iHeart contends that SoundExchange's evidentiary objections consist of untimely motions *in limine* and motions to strike testimony. That is wrong. SoundExchange's objections were on time, entirely proper and required by the Judges' April 9, 2015 Order Regarding Hearing and Prehearing Schedule ("Order"). In the alternative, iHeart opposes the objections on the merits. SoundExchange responds to offer its competing views on the legal issues likely to recur at the hearing. But, as SoundExchange noted in its objections¹ and as the Judges acknowledged at the pre-hearing telephonic conference, resolution of the objections likely will depend in large part on the context of the evidence offered, and would benefit from a more complete record.

¹ See SoundExchange's Objections to Testimony and Exhibits at 1 (noting that "resolution of some objections necessarily will depend on the context and the record as it unfolds during the hearing"); 4 (proposing that Pureplay Settlement Agreement evidence be provisionally admitted in order to develop a full record at the hearing); and 6 ("The outcome of many of the attached hearsay objections necessarily will depend on the context in which the evidence is presented.").

A. SoundExchange Filed Timely Objections As the Order Required.

iHeart has two complaints about SoundExchange's timeliness: (1) It contends that SoundExchange's objections to testimony (as opposed to "exhibits") are untimely; and (2) it contends that SoundExchange's objections include four improper "motions *in limine*." Neither is correct.

First, the written testimony the parties seek to admit consists entirely of "exhibits," so it was appropriate to include objections to such exhibits in response to the Order. The parties submitted exhibit lists on April 14, in accordance with the Order. The exhibit list submitted by iHeart – as well as the exhibit list for Pandora, NAB, Sirius, and SoundExchange – listed as exhibits each piece of written testimony the proponent planned to seek to admit into evidence at the hearing. *See* iHeartMedia's Hearing Exhibit List dated April 15, 2015. Five days later, again as required by the Order, SoundExchange filed its "identif[ied] objections to the admissibility of the proposed exhibits of each other participant" – including its objections to the admissibility of the written testimony included as exhibits on each participant's exhibit lists. SoundExchange's objections thus were not untimely. Indeed, they were *required* by the Order, which made clear that the Judges would "deem all evidentiary objections except relevance waived" if a participant failed to "identify and communicate" its objections to all of the proposed exhibits by April 20. Order at 2, 4 (emphasis added).

Second, SoundExchange's short memorandum explaining its objections did not transform SoundExchange's objections into improper "motions *in limine*." "A motion in limine is a procedural device to obtain an early and preliminary ruling on the admissibility of evidence." *Goodman v. Las Vegas Metro. Police Dep't*, 963 F. Supp. 2d 1036, 1046 (D. Nev. 2013). SoundExchange provided the memorandum explaining its objections not to seek an "early and preliminary ruling" on evidence in advance of the hearing, but because exemplars of exhibit lists

from prior proceedings had included similar explanatory statements. In fact, SoundExchange's memorandum noted several times that it was *not* seeking to preclude objectionable evidence in advance, and that it believed the Judges would likely need context in order to consider its objections. *See supra* n.1.

SoundExchange is not aware of any rule governing this proceeding that requires particular issues to be presented in a motion *in limine* for an advance ruling rather than a contemporaneous objection at trial, and iHeart has cited none. iHeart's complaints cannot relate to the nature of the objections – which were similar to those asserted by the Services (e.g., hearsay, cumulative/duplicative testimony, beyond the scope, etc.). Whether such evidentiary issues should be presented in a motion *in limine* or at trial depends on the nature of the issue and other factors generally entrusted to the discretion of counsel. *See Mixed Chicks LLC v. Sally Beauty Supply LLC*, 879 F. Supp. 2d 1093, 1095 (C.D. Cal. 2012) (offering prudential advice for parties on what constitutes “proper” versus “improper” reasons for motions *in limine*). Participants were not required “[t]o present all conceivable evidentiary objections that might arise at trial” by way of motions *in limine*. *Id.* If they had been, then there would have been no reason for the Judges to issue the Order requesting such objections be filed by April 20. iHeart's complaint of untimeliness is unfounded and should be denied.

B. The Pureplay Settlement Agreement's Rates and Terms Are Inadmissible In This Proceeding.

SoundExchange did not seek to exclude in advance evidence incorporating the Pureplay Settlement Agreement's rates and terms. Instead, SoundExchange specifically proposed that the Judges provisionally admit such evidence so that it could be dealt with in post-trial briefing on a complete record.

As a matter of law, the statutory bar against the admission or consideration of the rates and terms of the Pureplay Settlement Agreement in this proceeding is explicit – and markedly does not say what iHeart says it says. While iHeart contends that the statute bars consideration of the rates and terms in the Pureplay Settlement Agreement “for the purpose” of setting rates in this proceeding, the statutory bar contains no such language allowing admissibility for one purpose but not another. To the contrary, the rates and terms shall not “*be admissible as evidence or otherwise taken into account*” in any rate-setting proceeding. The parties confirmed their intent in the Pureplay Settlement Agreement itself, affirming *twice* that the parties did not intend for the Pureplay Settlement Agreement’s rate and terms to be a part of this proceeding *in any way*: “No person or entity may, *in any way*, seek to use *in any way* these Rates and Terms in any such proceeding.” 74 Fed. Reg. 34796, 34801, at ¶ 6.3 (emphasis added). As the Judges have recognized in another context, the statutory bar is broader than simply disallowing the agreement as a precedent. It extends to bar its *admissibility altogether*, unless parties to the agreement expressly authorize its admission. Order Granting In Part and Denying In Part Motion to Compel SoundExchange to Produce Documents In Response to Rebuttal Document Requests Nos. 26 and 47, at n.1. And that has not happened.

As SoundExchange predicted, iHeart argues that parties may introduce the terms of the Pureplay Settlement Agreement [REDACTED]. But that does not address the statute’s text barring the Pureplay Settlement Agreement’s rates and terms from either being admitted as evidence or “otherwise taken into account.” 17 USC 114(f)(5)(C). The parties to the Pureplay Settlement Agreement entered into its rates and terms “as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers

rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller.” *Id.* The terms cannot be inoculated [REDACTED] exactly what the parties explicitly intended them not to become. It isn’t as though the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] And as such, they are not admissible into evidence in this proceeding and cannot be considered “in any way.” 74 Fed. Reg. 34796, 34801, at ¶ 6.3 (emphasis added).

The statutory bar must be applied evenly to both sides’ presentations of evidence. Principles of fairness underlie SoundExchange’s need to conduct an effective cross-examination – which would require examination [REDACTED]. That fairness remains in jeopardy due to the nature of the evidence offered and the statutory bar precluding its admission. A rule that allows affirmative testimony on a topic but precludes cross-examination would not stand, just as if the Services were asserting a privilege to prevent inquiry into the subject matter presented. In such cases, “where assertion of the privilege unduly restricts a defendant’s cross-examination, the witness’ direct testimony may have to be stricken.” *United States v. Coven*, 662 F.2d 162, 170-71 (2d Cir. 1981); *see also United States v. Workman*, 138 F.3d 1261, 1263-64 (8th Cir. 1998) (reversing the trial court’s evidentiary ruling on grounds that attorney client communications cannot be used as both a sword and a shield and ruling that defendant waived privilege by putting the legal advice he received at issue).

C. Despite Repeated Requests, iHeart Has Never Distinguished Between the Testimony of Profs. Fischel and Lichtman.

SoundExchange has asked repeatedly whether iHeart will agree to submit separate statements from Profs. Fischel and Lichtman, or specify which paragraphs each will testify about. iHeart has refused to do so, instead offering generalizations about which topics the witnesses are “primarily responsible” for. *See, e.g.*, WRT of Fischel/Lichtman at n.12. Offering witness statements signed by two witnesses who emphasize their collaboration, while refusing to explicitly define what each will testify about, strongly suggests that iHeart intends to offer each witness on the same topics. To eliminate the objection, iHeart need only agree to specify for SoundExchange which topics it intends to offer through each witness, allowing SoundExchange to effectively prepare without a concern about duplicative testimony. But even in iHeart’s response to this objection, it still refuses to do so. While iHeart assures the Judges and SoundExchange that it has “every incentive” to avoid duplicative testimony, iHeart does not agree that it *will* avoid cumulative testimony. The continued refusal to commit to separate sets of topics for each witness suggests that iHeart intends to keep its options open for cumulative testimony in the event one witness does not handle a topic effectively.

D. Profs. Fischel and Lichtman Offer Rebuttal That “Strays Too Far” From SoundExchange’s Direct Case.

The Judges have held that rebuttal testimony exists on a “a continuum, on which rebuttal testimony that has the appropriate ‘nexus’ is acceptable, but rebuttal testimony that ‘strays too far’ from the opposing party’s direct testimony is inappropriate.” Order Denying Licensee Services’ Motion to Strike SoundExchange’s “Corrected” Written Rebuttal Testimony of Daniel Rubinfeld (“Rubinfeld Order”) at 7. Professors Fischel and Lichtman stray too far.

To attempt to show the requisite “nexus,” iHeart does not cite to SoundExchange’s testimony that it is rebutting nor does it quote a word of SoundExchange’s written direct case.

iHeart relies instead on its own experts' characterizations of SoundExchange's testimony—not the testimony it is purportedly rebutting. Nonetheless, SoundExchange has reviewed iHeart's responses in substance and, based on iHeart's representations, withdraws its objections to Fischel/Lichtman WRT ¶¶ 16-20 & Exs. A-D as well as ¶¶ 5, 110-116.

Three objections fail to show an appropriate nexus to SoundExchange's written direct testimony:

- Fischel/Lichtman WRT ¶ 27: Fischel and Lichtman's discussion of income to artists touring, shows, and live performances simply has nothing to do with revenue earned from sound recordings and is thus beyond the scope. Because SoundExchange's written direct testimony (and Prof. Rubinfeld in particular) discuss the revenues earned by copyright owners from the exploitation of their sound recordings, this testimony "strays too far" from SoundExchange's direct case.
- Fischel/Lichtman WRT ¶¶ 78-81: Fischel and Lichtman's discussion of a new purported benchmark—that of musical works—has nothing to do with Prof. Rubinfeld's interactive services benchmarks nor does it point out any difficulty in modeling the differences between interactive and non-interactive services. Musical work benchmarks were not presented by anyone in the direct case. This testimony and analysis offers a "sufficiently dissimilar" benchmark and therefore strays too far from SoundExchange's direct case. *See* Rubinfeld Order at 11.
- Fischel/Lichtman WRT ¶¶ 7, 117-121: Fischel and Lichtman's discussion of interest rates is, as iHeart admits, not responding to any testimony and instead is merely "bolstering iHeartMedia's proposed rate." iHeartMedia's Response To SoundExchange's Untimely Motions In Limine and to Strike Testimony ("iHeart Resp.") at 7. Bolstering, which is all this testimony does, is not proper rebuttal. *See* Rubinfeld Order at 5.

SoundExchange's objections to these sections of Profs. Fischel and Lichtman's testimony should be sustained.

E. The Federal Rules of Evidence Do Not Recognize an Exception for "Real Parties in Interest," And Such An Exception Does Not Apply Here In Any Event.

iHeart argues that SoundExchange's hearsay objections as to record-company declarants are designed to allow SoundExchange to present a "wholly one-sided story. . .without fear of contradiction." iHeart Resp. at 8. SoundExchange has no plans to do that. The rules of

evidence should be evenhandedly applied, and if SoundExchange attempted to use them to gain an unfair advantage, the Judges can make appropriate evidentiary rulings to address that. In the recent Prehearing Order, the Judges recognize that they *may* admit hearsay under the governing regulations, but are “inclined to interpret narrowly the circumstances where admission of hearsay evidence is appropriate.” Prehearing Order at 3; 37 CFR 351.10. Faced with a hearsay objection, a party must be prepared to articulate why consideration of the evidence would be appropriate here, including whether the evidence “falls within a hearsay exception in the Federal Rules of Evidence, or demonstrate other indicia of reliability.” Prehearing Order at 3.

iHeart is wrong on the law governing hearsay under the Federal Rules. iHeart contends that documents in which a record company employee is the out-of-court declarant are not hearsay because they are admissible under Federal Rule of Evidence 801(d)(2). That rule lists five specific carve-outs from the hearsay rule for statements by a party-opponent. iHeart does not specify any one of those recognized carve-outs. Instead, iHeart contends that documents in which a record company employee is a declarant are not hearsay because the record companies are among the “real parties in interest” here and SoundExchange is merely litigating “on their behalf.” iHeart Resp. at 9. This is not a recognized exception within the Federal Rules of Evidence.

Exceptions related to identity of interest or privity between declarants and parties existed at common law. But the Federal Rules of Evidence expressly did not include them when enacted in 1975. Instead, the Federal Rules deliberately elected to set aside the question of whether there was unity of interests between the party and the declarant in deciding whether a statement is hearsay. See *e.g.*, *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979); *In re Cornfield*, 365 F. Supp. 2d 271, 276–77 (E.D.N.Y. 2004), *judgment aff’d*, 156 F. App’x 343 (2d Cir. 2005);

McCormick on Evidence, Sec. 260; Federal Practice & Procedure – Evidence, Section 7019. iHeart’s asserted “real parties in interest” exception is a vestigial descendant of these privity-based exceptions, not recognized by the Federal Rules.

The cases on which iHeart relies do not recognize such an exception within Federal Rule of Evidence 801(d)(2). In *Roberts v. City of Troy*, 773 F.2d 720, 726 (6th Cir. 1985), the Court (in iHeart’s quoted passage) cited two cases decided *before* the drafting of the Federal Rules as having acknowledged a “real party in interest” exception, but the Court did not actually apply the exception in the *Roberts* case. The rest of the cases provide even less support. In *In re TOUSA, Inc.*, 444 B.R. 613, 665 n.53 (S.D. Fla. 2011), the declarant was *actually a party* – the agent or officer of one of the debtors in the bankruptcy. *U.S. ex rel. Milam v. Regents of Univ. of Cal.*, 912 F. Supp. 868, 880 (D.Md. 1995) presents the unique procedural posture of a False Claims Act case, in which the United States’ interests are pursued directly by a relator.

Most importantly, none of these cases presents the facts we have here: a membership organization with hundreds of members who are both record companies and recording artists. iHeart cites no case in which a single member of such an organization could make statements that are admissible against the organization as a whole. The policies underlying the party-opponent exception to the hearsay rules do not support this either. The party-opponent exception exists because it is generally fair to make parties accountable for their own statements, and the risks inherent in hearsay are not as great if the person who made the statement is actually a party to the case. In that instance, the declarant can explain the context if necessary. Neither of those policies underpin applying the party-opponent exception here. SoundExchange is not the declarant – nor did SoundExchange authorize the statements. And not every record company declarant will be present to explain any requisite context.

Again, SoundExchange acknowledges that the Judges cannot decide its hearsay objections in the abstract, and that decisions will need to be made when the evidence is offered. The Judges cannot determine without reference to documents whether all documents authored by any record company employee would constitute inadmissible hearsay any more than they could conclude the opposite. In accordance with the Prehearing Order, the parties should be prepared to make the requisite showing regarding whether a particular exhibit's admission would be appropriate, rather than ruling on these issues in the abstract.

Dated: April 24, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2015, I caused a copy of the foregoing PUBLIC —

SOUNDEXCHANGE'S RESPONSE TO IHEARTMEDIA, INC.'S FILING REGARDING

SOUNDEXCHANGE'S EVIDENTIARY OBJECTIONS to be served via electronic mail and

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